201535

ARNOLD & PORTER
555 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20004-1206
(202) 942-5000
FACSIMILE: (202) 942-5999

NEW YORK
DENVER
LOS ANGELES
LONDON

DENNIS G. LYONS
(202) 942-5858

February 20, 2001

BY HAND

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
Case Control Unit
Attn: STB Ex Parte No. 582 (Sub-No. 1)
1925 K Street, NW
Washington, DC 20423-0001

Re: STB Ex Parte No. 582 (Sub-No. 1),
"Major Rail Consolidation Procedures"

Dear Secretary Williams:

Enclosed for filing in the above-referenced matter are an original and 25 copies of the Reply of CSX Corporation and CSX Transportation, Inc., to Motion of Canadian National Railway Company to Strike CSX NAFTA Rebuttal or, in the Alternative, Petition for Leave to File Surrebuttal.

Kindly date-stamp the extra copy of this letter and the Reply, which our messenger is presenting, and return them to the messenger.

If there are any questions concerning this matter, please call the undersigned at (202) 942-5858.

Sincerely yours,

Dennis G. Lyons
Counsel for CSX Corporation and CSX Transportation, Inc.

rjm
Enclosures
cc All Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REPLY OF CSX CORPORATION AND CSX TRANSPORTATION, INC., TO MOTION OF CANADIAN NATIONAL RAILWAY COMPANY TO STRIKE CSX NAFTA REBUTTAL OR, IN THE ALTERNATIVE, PETITION FOR LEAVE TO FILE SURREBUTTAL

Mark G. Aron
Peter J. Shudtz
CSX CORPORATION
One James Center
901 East Cary Street
Richmond, VA 23219
(804) 782-1400

Paul R. Hitchcock
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, FL 32202
(904) 359-3100

Dennis G. Lyons
Claire E. Reade
Mary Gabrielle Sprague
Sharon L. Taylor
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202
(202) 942-5000

James F. Rill
Mark Schechter
Virginia R. Metallo
Timothy E. Boyle
Ramsey J. Wilson
HOWREY SIMON
ARNOLD & WHITE, LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Counsel for CSX Corporation and CSX Transportation, Inc.

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CSX Corporation and CSX Transportation, Inc. (collectively "CSX"), hereby file their Reply to the Motion of Canadian National Railway Company to Strike CSX NAFTA Rebuttal or, in the Alternative, Petition for Leave to File Surrebuttal, filed in this matter on January 30, 2001. CSX's Reply is filed pursuant to 49 C.F. R. § 1104.13(a).

BACKGROUND

Canadian National Railway Company ("CN"), which has opposed substantially every proposal by the Board in the present rulemaking proceeding to modernize the Board's rules with respect to transborder transactions, objects to CSX's Rebuttal Comments on that subject, and has moved to strike them. Without citing any supporting authority from the Board's rules or precedents, CN claims

that CSX's Comments should have been presented in some sort of minuet, in a sequence acceptable to CN.

On the topic of transborder issues, CN presented 16 pages in its Initial Comments filed November 17, 2000, and in addition filed 11 pages of Comments on the issue in its December 18 filing, making it the topic to which CN devoted the most space. *See* CN Opening Comments at 23-28 and Reply Comments at 20-30. In its Rebuttal Comments filed January 11, 2001, CSX rebutted those two presentations, and supported its own Opening Comments on the subject. The procedure followed by CSX was logical and not violative of any rules of the Board. It may have upset CN that CN's generally vague assertions about NAFTA were subjected by CSX to an analysis actually based on the text of NAFTA, but CN's decision to present its case in its opening filings with a minimum of detail as to the text of the treaty arrangements was its own decision.

Occupying the same document as the Motion to Strike, CN presented a "Petition for Leave to File Surrebuttal" – a surrebuttal which CN in fact filed without leave. CN finally presents in the surrebuttal, for the first time, some attempt to justify its arguments on the basis of the text of NAFTA. The arguments thus made by CN, however, generally exalt form over substance and are unavailing, as we will demonstrate next.

DISCUSSION

CN's Motion offers a great deal of heated rhetoric, laced with several highly misleading assertions. However, CN provides no insights whatsoever into the NAFTA provisions relevant to the actions the Board may take on transnational issues under its revised merger rules. Without doubt, NAFTA gives the Board full powers to ask the questions it has proposed in its merger rules, and to receive complete answers to them in the Application, in order to assess whether the resultant rail services will meet required U.S. consumer (shipper) protection, safety, environmental and other standards. NAFTA Chapters 9, 11, and Chapter 12 support these Board initiatives unequivocally. We briefly discuss the flaws in CN's major complaints below and review the NAFTA principles that in fact apply here.

1. NAFTA's Objectives Find Their Practical Embodiment in NAFTA's Rules

The complaints in CN's January 30 submission range from the trivial to the ambitious; they are all without merit. CN begins by accusing CSX of "willful blindness" in its interpretation of NAFTA's rules, apparently because CSX pointed out CN's predilection for citing NAFTA objectives rather than actual NAFTA requirements, in support of CN's claims. CN Motion at 5. CN responded to this CSX "blindness" by quoting selective portions of certain general NAFTA trade liberalizing objectives listed in NAFTA Article 102 as evidence for its claims that

these stated general objectives somehow constrain the Board's proposed questions to transnational applicants under the merger rules.

CSX certainly does not dispute that NAFTA's "objectives" provide a general context for understanding where NAFTA is going. In treaties, just as in other legal prescriptions, such as statutes, specific mandatory provisions take precedence over general statements of objectives. The purpose of the Internal Revenue Code is to raise revenue; but that does not mean that every time there is a dispute involving a taxpayer, the taxpayer is to lose. The provisions in the treaty as to the powers that are retained by the three States entering into it are deserving of as much respect as the provisions in which they mutually agree to restraints on their sovereign powers. NAFTA was designed to achieve a wide array of objectives, including objectives that resulted in the particular NAFTA rules CN would like to avoid. Finally, NAFTA explicitly provides how the objectives CN emphasizes so stridently are to be interpreted, and its language leaves no doubt that the detailed rules of NAFTA Chapters 9, 11 and 12 must be respected.

Specifically, Article 102, which contains the statement of objectives CN repeatedly cites, begins with a most telling introduction, as follows:

> "The objectives of this agreement, *as elaborated more specifically through its principles and rules*,... are to...." (Emphasis added.)

Article 102 then goes on to list a number of general objectives, including those cited by CN. When CN's "objectives" are read in light of Article 102's

introductory language, it becomes obvious that the NAFTA parties did not intend these objectives to constitute independent, freestanding NAFTA rules. Rather, the NAFTA objectives listed in Article 102 are embodied in the specific NAFTA rules that follow NAFTA Chapter One. Accordingly, contrary to CN's claims, there is no question that the Board can and should use the specific rules outlined in NAFTA's Chapters 9, 11 and 12 to guide its actions. Article 102 leaves no doubt: these detailed rules are the more specific elaboration of NAFTA's objectives.

2. CSX's NAFTA Analysis of CN's Last Rail Consolidation Proposal

CN's second objection to CSX's submission results from CN's misreading of a very simple point made by CSX in analyzing what NAFTA issues would arise in a future rail consolidation, if, for example, CN decided to resurrect its recent rail consolidation proposal with BNSF. CN claims CSX "eviscerated" NAFTA by ignoring the rights NAFTA gives to corporations – here, Canadian corporations – when they qualify as NAFTA "investors." That is nonsense. CSX was merely commenting on the fact that the particular NAFTA "investors" – the stockholders of CN – affected under the last consolidation proposal made by CN were given equal treatment with U.S. nationals under NAFTA. In that proposed transaction, and presumably in any transaction that follows its model to obtain a similar escape

from adverse tax consequences,[1] there was no Canadian corporation acquiring the stock of a United States corporation at all. The stock of the existing BNSF holding company was to be acquired by a new Delaware corporation, and under complex arrangements the stockholders of CN and of BNSF were to acquire equal interests in each of the two railroads. Since that proposal (and any transborder proposal modeled after it to achieve similar objectives) would involve only the NAFTA rights of shareholders, rather than the NAFTA rights of any corporate entities, CSX had no occasion in this context to comment about CN's status itself as an "investor" in its own right. The CSX rebuttal comments, of course, went on to review in considerable detail what NAFTA rights CN itself would and would not enjoy. *See* CSX Rebuttal Comments at 53-66.

3. NAFTA Protections Against Nondiscrimination Extend Only to Service Suppliers and Investors in "Like Circumstances"

It should be noted that CN's assertion is simply that it is wrong, under NAFTA, for Proposed § 1180.1(k) and Proposed § 1180.11 to require information of a certain sort which is to be furnished only when a "major Canadian [or] Mexican" railroad is involved as an applicant. CN says that it makes no difference

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[1] The structure of the transaction may have been in part dictated by the unique requirement of Canadian law that no interest can own any more than 15% of CN's stock, which restricts the choices of structures that may be involved in a transaction involving CN. *See* the discussion in CSX's Opening Comments, at 20-21 & n.3.

that the information in question is most pertinent when such a major non-U.S. company is an applicant. The issue presented is whether this adjustment of the information requirements to meet specific needs is justifiable under NAFTA.

To CN's apparent chagrin, CSX pointed out in its Rebuttal Comments that CN would not be able to claim that the Board's transnational questions to foreign rail service applicants were discriminatory, and thus were barred by the nondiscrimination provisions in NAFTA Article 1102 or Article 1202. Article 1102 and Article 1202 nondiscrimination requirements only protect foreign entities that are "in like circumstances" with their U.S. counterparts. CN would not qualify as being "in like circumstances" with any U.S. rail service providers with respect to the kinds of inquiries the Board is planning to make under its merger guidelines. Therefore, the Board would be fully within its rights to make the additional inquiries to CN and other foreign rail carriers that it believes to be prudent, and to have those information requests satisfied in the Application.

CN's submission tries to blot out the "in like circumstances" limitation on the nondiscrimination obligations in NAFTA Chapters 11 and 12, but its efforts rely almost entirely on a misleading partial quotation of language from a single NAFTA arbitral panel opinion. According to CN, the arbitral panel found that "in like circumstances" simply meant operating in the same economic sector. Thus, CN appears to conclude, all rail services sector participants must receive identical

treatment under the Board merger guidelines. As CN put it, "Thus, the test for 'like circumstances' examines 'whether a non-national investor complaining of less favourable treatment is in the same 'sector' as the national investor.' It is clear that Canadian carriers, such as CN, are in the same sector as U.S. carriers...." CN Motion at 13.

While NAFTA Chapter 11 arbitral panel findings are not in any pertinent sense authoritative interpretations of NAFTA provisions,[2] it is interesting to see what the panel actually said in analyzing the concept of "like circumstances." Contrary to CN's characterization, the arbitral panel engaged in a far-ranging discussion of the term in other international legal contexts, making the general point that a notion of "like circumstances" must begin with the concept that the firms in question must be operating in the same sector. NAFTA Arbitration Between S. D. Myers, Inc. and The Government of Canada, Partial Award, November 13, 2000 ("Panel Decision"), paragraph 248.[3] However, the panel went on to indicate that policy concerns of a particular country also can come into play in determining whether foreign firms and domestic firms are in like circumstances.

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[2] NAFTA Article 1136(1) says: "An award made by a Tribunal [*i.e.*, a Chapter 11 panel] shall have no binding force except between the disputing parties and in respect of a particular case."

[3] The Partial Award in the S.D. Myers arbitration is available on www.dfait-maeci.gc.ca/tna-nac/myersvcanadapartialaward_final_13-11-00, the Government of Canada website.

Panel Decision, paragraph 248. In addition, the panel commented that other case law indicated it was very important to examine the "context in which the measure was established and applied and the specific circumstances in each case." Panel Decision, paragraph 249.

After discussing general NAFTA concerns related to the facts of the particular case at hand, the arbitral panel concluded by stating:

> The assessment of 'like circumstances' must also take into account circumstances that would justify governmental regulations that treat [entities] differently in order to protect the public interest. The concept of 'like circumstances' invites an examination of whether a non-national investor complaining of less favorable treatment is in the same 'sector' as the national investor.

Panel Decision, paragraph 250.

In other words, the panel properly viewed the term "in like circumstances" as a multifaceted concept. It did not conclude, as CN implies, that the critical issue – much less the only issue – to be considered in defining "like circumstances" was whether the entities being compared were in the same economic sector.

Not surprisingly, the arbitral panel's actual views on the nondiscrimination issue are consistent with the authoritative United States gloss on the meaning of NAFTA's nondiscrimination rules contained in the U.S. Statement of Administrative Action ("SAA") accompanying the implementing legislation for NAFTA in the United States. CSX quoted in full the SAA's explanation of the nondiscrimination language used in Article 1102 and Article 1202 on pages 62-63

of its Rebuttal Comments. To recap, using just a small excerpt from the SAA's discussion: "NAFTA's nondiscrimination provisions ... do not bar legitimate regulatory distinctions between [domestic] firms and foreign service providers." Statement of Administrative Action, House Doc. No. 103-159, Volume 1, at 601. In short, contrary to CN's claims, the Board is on very firm NAFTA footing in deciding to ask foreign merger applicants certain questions it does not ask of domestic applicants, given the Board's prudential concerns and regulatory mandate.

On February 15, 2001, CN submitted a "Notice of Supplemental Authority," citing a recent NAFTA Chapter 20 arbitral panel report relating to Mexican trucking as ostensible further support for its position that NAFTA's investment rules somehow prevent the Board from asking certain questions of foreign rail service providers. In fact, the panel decision only confirms what CSX has been saying. CN's interpretative missteps begin when it quotes from summary conclusions in the panel opinion, while ignoring the fact that the trucking case involved U.S. actions worlds apart from the situation here. The trucking dispute involved a blanket ban by the United States on any Mexican investment in the U.S. trucking sector under any circumstances. Moreover, this was a ban imposed for purely political purposes that the U.S. did not try to justify or defend in any manner under NAFTA, as CN itself actually noted. February 15 filing at 2-3. Similarly,

the U.S. refused to examine any individual Mexican trucking firms to see if they met U.S. safety standards. Rather, it banned them from providing U.S. services simply on the basis that the Mexican government system for ensuring truck safety was deficient. Given these facts, it is hardly surprising that a panel would find the U.S. bans were overbroad and thus were inconsistent with NAFTA's nondiscrimination requirements. The circumstances in the trucking case do not in any fashion resemble the modest actions the Board proposes to take under its merger rules on individual applications in order to meet legitimate regulatory goals recognized by NAFTA and fully consistent with NAFTA's requirements.

Indeed, it is perhaps more intriguing that CN neglects to point out specific findings in the trucking case that directly support the Board's proposed actions here. In fact, the trucking panel explicitly acknowledged that NAFTA allows differing treatment of foreign service providers. As the panel stated in paragraph 300 of its findings: "The United States may not be required to treat applications from Mexican trucking firms in exactly the same manner as applications from U.S. or Canadian firms.... U.S. authorities are responsible for the safe operation of trucks within U.S. territory, whether ownership is U.S., Canadian or Mexican." The panel then elaborated this point in paragraph 301 of its findings, stating: "...it may not be unreasonable for a NAFTA Party to conclude that to ensure compliance with its own local standards by service providers from another NAFTA country, it

may be necessary to implement different procedures with respect to such service providers." The panel then noted that any decision to impose requirements on Mexican trucking firms that differed from those imposed on U.S. or Canadian carriers "must (a) be made in good faith with respect to a legitimate safety concern and (b) implement differing requirements that fully conform with all relevant NAFTA provisions." The Board's proposals certainly are made in good faith, they respond to legitimate regulatory concerns, and as CSX has discussed extensively, they fully conform with all relevant NAFTA provisions.

4. NAFTA Standard Setting Rules Give the Board Broad Powers

CN's final set of major complaints in its January 30 Motion focuses on the relevance of NAFTA Chapter 9, Standards-Related Measures, to the Board's actions under its merger rules. CSX had pointed out in its rebuttal comments that Chapter 9 is highly germane to the circumstances present here. Contrary to CN's claims, in developing these merger rules, the Board is dealing with "technical regulations," "conformity assessment procedures," and "approval procedures," as defined in NAFTA Chapter 9.[4]

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[4] CN apparently tries to take comfort from the fact that the NAFTA trucking panel decision discussed in CN's Notice of Supplemental Authority stated that NAFTA Chapter 9 did not apply to investment. However, this statement does not change the fact that there are clear limitations on CN's NAFTA investment rights, as CSX has pointed out. Furthermore, Chapter 9 clearly applies to services, and

Footnote continued on next page

As CN itself notes, under Chapter 9, a "technical regulation" is any government standard outlining the mandatory characteristics that a service or the service's "operating methods" must have. A technical regulation also includes any "applicable administrative provisions" related to these standards. A "conformity assessment" procedure is closely linked to a technical regulation, since it is any procedure used "directly or indirectly" to determine whether the requirements of a technical regulation have been met. Finally, NAFTA Chapter 9 defines an "approval procedure" as "any ... mandatory administrative procedure for granting permission for a .... service to be produced, marketed or used for a stated purpose or under stated conditions."

The STB's merger rules are designed, in pertinent part, to ensure that the rail services being proposed in the context of a merger meet a variety of preexisting mandatory rules that go directly to the "characteristics" of these services. Those rules are embodied in the provisions of Subtitle IV of Title 49, U.S. Code, and in the regulations of the Board and the body of precedents of the Board and its predecessor interpreting them. Similarly, the Board must obtain information about the "operating methods" used to deliver those rail services, and must assess

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Footnote continued from previous page
the Board's transnational questions focus specifically on concerns related to future rail services. Hence, Chapter 9's relevance is beyond dispute.

whether those "operating methods" comply with a variety of mandatory U.S. standards designed to protect safety, consumers, the environment and other similar interests. Clearly, then, the Board is engaged in a NAFTA Chapter 9 "conformity assessment" procedure.

Moreover, contrary to CN's claims, NAFTA Chapter 9 makes it very clear that the Board is permitted to use risk assessment in deciding whether the nature and quality of the services being proposed through the merger at issue meet the required U.S. standards. *See* Article 904(2), Article 907, and Article 908(3), referring to a government's right to consider "risks" in establishing what level of protection it wants to provide to achieve its legitimate objectives. An assessment of whether rail services will meet all required U.S. standards certainly is a legitimate objective for the Board to pursue. Chapter 9's NAFTA provisions likewise make clear, as discussed in CSX's Rebuttal Comments at 53-61, that the Board has the power to establish whatever level of protection makes it comfortable that its assessment process will assure these standards are being met. The Board's inquiries related to transnational mergers are an important means to assure the Board that the services conform with the legitimate U.S. standards that have been established for rail services.

Finally, as CSX has pointed out, and CN has not even attempted to rebut, certain STB requirements imposed under the merger rules also can be viewed as

approval procedures covered by NAFTA Chapter 9. As CSX discussed in its Rebuttal Comments at 60-61, NAFTA Article 908(4) and NAFTA Article 908(3)(a) make clear that the Board can establish procedures for approving or disapproving the provision of rail services in the United States. These provisions also make clear that the Board's approval procedures can include any inquiries that the Board believes are necessary to give the Board confidence that the rail services will conform to all standards established in the United States related to the characteristics of these services or their operating methods. In deciding how rigorous these approval procedures should be, NAFTA Article 908(3)(a) also tells the Board that "it can take into account the risks that nonconformity [with the required service standards] would create." Given the considerable risks created if foreign-sourced rail services could not meet U.S. safety, reliability, national security, consumer, and environmental standards, it is evident that modest list of questions the Board would pose to foreign applicants under the merger rules is fully consistent with the requirements outlined in NAFTA for appropriate "approval procedures."

* * * * *

In its February 15 filing (discussed in more detail in Section 3, above), CN equates the action of the U.S. Government in treating all trucking concerns owned by Mexicans as unsafe with the Board's efforts to obtain a modest amount of

information concerning transborder issues, relating to subjects within its exclusive competence. Such an attempt to equate the Board's proposal with a flat prohibition against nationals of a treaty country investing in specified economic areas or providing specified services seems only to demonstrate the essential error of CN's position. The Board has not undertaken to prohibit companies organized under Canadian law, or their subsidiaries, from operating in the United States. Canadian companies have successfully acquired, built and operated railroads in the United States for a great many years, and have been afforded "national" treatment by the Board and its predecessor, indeed without need for NAFTA. All that is being proposed by the Board is that in the case of a major merger involving a major Canadian railroad as an applicant, some issues which have particular pertinence in such a situation be addressed in the application. The Board is cognizant, as its proposed regulations clearly indicate (*see* Proposed § 1180.1(k)(2)), that the resolution of any transborder issue must be consistent with the treaty obligations of the United States.

AN ALTERNATIVE APPROACH

The foregoing discussion indicates that the Board's proposals are completely consistent with NAFTA, and that the points asserted by CN exalt form over substance. The Board should not be reluctant to adopt its regulations as proposed, including refinements suggested by CSX in its Opening Comments at 20-23.

As noted above, the objections of CN are essentially formal, rather than substantive: under Proposed § 1180.1(k) (and under Proposed §1180.11), certain information must be given in the Application when a major Canadian or Mexican railroad is an applicant, but not otherwise. CN says that it really has no objection to providing the information, but wishes to present it (apart from the full system operating plan and other plans[5]) in the applicants' rebuttal, rather than in the Application as part of its *prima facie* case. It is aggrieved, it says, by the "discrimination" it finds implicit in Proposed § 1180.1(k) and Proposed § 1180.11.

That being so, the Board may wish to avoid an unproductive dispute over the essentially formal issues raised by CN, while insisting on a solid treatment of the pertinent issues in the Application as part of a *prima facie* case. The fact of the matter is that it is not only the two great railroad systems that are headquartered in our neighbor to the North that have system operations both in the United States and in foreign countries; a number of United States-based railroads, including CSX, have such operations. The transborder issues are present to some, albeit a lesser extent, in cases involving only those carriers as well.

To avoid the charge (however meritless) of discrimination against the Canada-based carriers, the transborder regulations could be made applicable to all major transactions. In this regard, we present revisions of the Board's Proposed

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[5] CN says that it is willing to present such plans in any application it might file.

§ 1180.1(k) and § 1180.11 which give effect to this. It should be noted that these revisions also give effect to the enhancements proposed by CSX in its Opening Comments; these are set forth in square brackets.[6]

* * * * *

[Proposed Revised Sections]

Proposed § 1180.1(k): Transnational issues. *(1) Future merger applications may present novel and significant transnational issues. In all major transactions, applicants must submit "full system" competitive analyses [, service assurance plans,] and operating plans — incorporating their operations in countries outside the United States as well as in the United States — from which we can determine the competitive, service, employee, safety, and environmental impacts of the prospective operations within the United States. [Public benefit analyses, however, should distinguish between benefits whose impacts will be felt within the United States and those which will not.] With respect to rail safety in the United States, applicants must explain how cooperation with the Federal Railroad Administration will be maintained without regard to the location of dispatching, managerial or other business functions. In all cases, applicants must assess the likelihood that commercial decisions made by their railroads could be based on*

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[6] A version of the revisions of the two proposed sections, marked to show the changes from the Board's proposals in the NPR, is attached as Appendix A. hereto

national or provincial rather than broader economic considerations and be detrimental to the interests of the United States rail network, and applicants must address how any ownership [or directorship] restrictions imposed otherwise than by the laws of the United States might affect our public interest assessment.

(2) The Board will consult with relevant officials as appropriate to ensure that any conditions it imposes on a transaction are consistent with the North American Free Trade Agreement and other pertinent international agreements to which the United States is a party. In addition, the Board will cooperate with those Canadian and Mexican agencies charged with approval and oversight of the proposed transaction.

Proposed § 1180.11: Transnational and Defense issues. *In all major transactions:*

(a) Applicants must explain how cooperation with the Federal Railroad Administration will be maintained without regard to the location of the dispatching, managerial or other business functions of the applicants.

(b) Applicants must assess the likelihood that commercial decisions made by the railroads could be based on national or provincial rather than broader economic considerations, and be detrimental to the interests of the United States, and discuss any ownership [or directorship] restrictions imposed otherwise than by the laws of the United States.

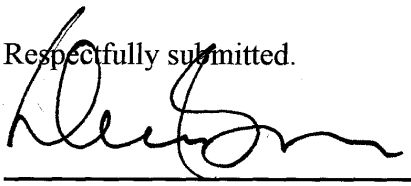
(c) Applicants must discuss and assess the national defense ramifications of the proposed merger.

CONCLUSION

For the reasons stated, CN's Motion to Strike should be denied; the Petition for Leave to File Surrebuttal should be denied as moot, the Surrebuttal having in fact been filed; the Board's transborder proposals are not in conflict with NAFTA, and the belated assertions of CN to the contrary should be disregarded.

The Board may, however, wish to avoid continuing controversy over the assertions made by CN, by modifying the proposals in question to make them applicable to all major transactions, as set forth herein.

Respectfully submitted.



Mark G. Aron
Peter J. Shudtz
CSX CORPORATION
One James Center
901 East Cary Street
Richmond, VA 23219
(804) 782-1400

Paul R. Hitchcock
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, FL 32202
(904) 359-3100

Dennis G. Lyons
Claire E. Reade
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ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202
(202) 942-5000

James F. Rill
Mark Schechter
Virginia R. Metallo
Timothy E. Boyle
Ramsey J. Wilson
HOWREY SIMON
ARNOLD & WHITE, LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Counsel for CSX Corporation and CSX Transportation, Inc.

February 20, 2001

APPENDIX A

BLACKLINE OF PROPOSED REVISED SECTIONS

Proposed § 1180.1(k): Transnational issues. *(1) Future merger applications may present novel and significant transnational issues. In ~~cases involving major Canadian and Mexican railroads~~* ***all major transactions****, applicants must submit "full system" competitive analyses* ***[, service assurance plans,]*** *and operating plans — incorporating their operations in ~~Canada or Mexico~~* ***countries outside the United States as well as in the United States*** *— from which we can determine the competitive, service, employee, safety, and environmental impacts of the prospective operations within the United States.* ***[Public benefit analyses, however, should distinguish between benefits whose impacts will be felt within the United States and those which will not.]*** *With respect to rail safety in the United States, applicants must explain how cooperation with the Federal Railroad Administration will be maintained without regard to the ~~national origins of merger applicants. When an application would result in foreign control of a Class I railroad~~* ***location of dispatching, managerial or other business functions. In all cases****, applicants must assess the likelihood that commercial decisions made by ~~foreign~~* ***their*** *railroads could be based on national or provincial rather than broader economic considerations and be detrimental to the interests of the United States rail network, and applicants must address how any ownership* ***[or***

directorship] *restrictions imposed* ~~*by foreign governments should*~~ ***otherwise than by the laws of the United States might*** *affect our public interest assessment.*

(2) The Board will consult with relevant officials as appropriate to ensure that any conditions it imposes on a transaction are consistent with the North American Free Trade Agreement and other pertinent international agreements to which the United States is a party. In addition, the Board will cooperate with those Canadian and Mexican agencies charged with approval and oversight of ~~*a*~~ ***the*** *proposed transaction.*

Proposed ~~***§1180.11Additional information needs for transnational mergers.***~~***§ 1180.11: Transnational and Defense issues. In all major transactions:***

(a) Applicants must explain how cooperation with the Federal Railroad Administration will be maintained without regard to the ~~*national origins of merger*~~ ***location of the dispatching, managerial or other business functions of the*** *applicants.*

(b) Applicants must assess the likelihood that commercial decisions made by ~~*foreign*~~ ***the*** *railroads could be based on national or provincial rather than broader economic considerations, and be detrimental to the interests of the United States,*

and discuss any ownership ***[or directorship]*** *restrictions imposed* ~~*on them by foreign governments*~~ ***otherwise than by the laws of the United States***.

(c) Applicants must discuss and assess the national defense ramifications of the proposed merger.

CERTIFICATE OF SERVICE

The undersigned counsel for CSX Corporation and CSX Transportation, Inc. hereby certifies that on this 20th day of February, 2001, a copy of the foregoing "Reply of CSX Corporation and CSX Transportation, Inc., to Motion of Canadian National Railway Company to Strike CSX NAFTA Rebuttal or, in the Alternative, Petition for Leave to File Surrebuttal," was served on all parties of record by first-class mail, postage prepaid, or more expedited method.

Dennis G. Lyons
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202
(202) 942-5858

Counsel for CSX Corporation and CSX Transportation, Inc.